15-1833

SUPPLEMENTAL PAGES TO:

Petition Under 28 U.S.C. § 2254 for A Writ Of Habeas Corpus;

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

JOSE ALBERT CASTRO, Petitioner,
v.
ROBERT GILMORE, et Al, Respondents

CIVIL ACTION NO. _____

PETITION FOR A WRIT OF HABEAS CORPUS

Attention Please; Mr. Jose Albert Castro, Petitioner, in pro se Capacity-through undersigned Jail-house Assistant, William Wallace, Sr. #AS-0568, hereby files this Petition for A Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254, based on A ["Gate Way Claim"] proper showing of Actual Innocence per the United States Supreme Courts Controlling decisional mandate in McQuiggin v. Perkins, 569 U.S. ___ (2013). Held: Actual innocence, if proven, serves As A gateway through which A Petitioner may pass Whether the impediment is A procedural bar, As Was in Schlup v. Delo, 513 U.S. 298, -And- House v. Bell, 547 U.S. 518, or expiration of the AEDPA Statute Of Limitations. The Court has Applied this "fundamental Miscarriage Of Justice exception" to Overcome various procedural defaults, including, [As most relevant here] failure to observe state procedural Rules, such As filing deadlines.

In Support of this Great Writ, Mr. Castro [Petitioner], State's the following:

1). Mr. Castro Was Arrested by York County Law enforcement on the herein Listed criminal offense that purportedly Occurred on July 31, 2009.

2). Mr. Jose Albert Castro, is in the Custody of the Commonwealth of Pennsylvania, in the State Correctional Institution At Greene, 175 Progress Drive, Waynesburg, Pa. 15370, sentenced to Mandatory life imprisonment without parole for the York County Criminal Conviction of murder in the first degree.

RELEVANT PROCEDURAL HISTORY

3). On September 13, 2010, Mr. Castro stood trial by Jury over which the Honorable, Gregory M. Snyder, Court of Common Pleas York County Pennsylvania, presided. Resulting in conviction of the Above named Petitioner.

4). On November 30, 2010, Mr. Castro was sentenced to Life without the possibility of parole.

5). Upon exercising A direct Appeal And Subsequent Post Conviction Relief Act review including Collateral Appeal from the same before the Superior Court. All Request for relief was denied. inturn, satisfying the "Requirement for Exhaustion Of State Remedies."

6). Respectfully an indepth procedural History regarding this case has been sufficiently outlined within Mr. Castro's Superior Court decision/Memorandum numbered at; 1682 MDA 2013, filed/decided February 9, 2015, of which is Attached "Appendix" hereto. therefore complete reiteration is not necessary here.

7). Mr. Castro (herein After, the Petitioner), presents Constitutionally based Meritorious Claims.

(A). PETITIONER'S RIGHTS TO FUNDAMENTAL FAIRNESS, DUE PROCESS AND EQUAL PROTECTION WERE VIOLATED CONTRARY TO LEGAL PRINCIPLES IN ACCORDANCE TO/WITH THE STATE AND FEDERAL CONSTITUTIONAL SAFEGUARDS;

8). Here, the Petitioner was denied meaningful interpreting Services when the need And Access Of not Less then two interpreters throughout All important Aspects of the Jury trial went ignored which is error per se. Petitioner, speak very little english "Less then perhaps A 15-word comprehensive dialect of the english Language". As A spanish speaking defendant on trial where the Commonwealth is seeking A conviction for Murder in the first degree. Petitioner not only needed interpreting services to understand the full testimony of english speaking witnesses on the stand, he further needed interpreting services to be Able to consult with his denfense counsel -And- Aswell to understand All open court discussion between the Judge And the Attorney's, Also, on the Other hand, At times when the Lone interpreter was busy/engaged translating A spanish-Speaking witness testimony into english, Petitioner was unable to communicate with his defense counsel to discuss that particular testimony.

9). Here, in the Absence of "Justifiable Explanation" it is not enough to say that A Judge need never Appoint more than one enterpreter to preserve A defendants due process rights. Recognized decisional Law-including cases from this Judicial district specifically recognize that Additional interpreting services Are required in some cases. See, e.g., United States ex rel Navarro v. Johnson, 365 F. Supp. 675 683 n.3 [E.D. Pa. 1993], "The case may well Arise where the defendants' constitutional rights may require the presence of two interpreters"...

10). Petitioner Aver that due process requires A full And complete Opportunity during the entire trial proceeding for A Defendant ["such As the Petitioner"], to be Able to confer with his Attorney. A denial of Adequate interpreting services constitutes constitutional error mandating reversal even Absent showing of Prejudice because not being Able to communicate with his defense counsel is the equivalent of having been denied effective Assistance of counsel, indeed a presumption of prejudice is warranted.

11). Moreover Petitioner's ignorance of the english Language combined with merely an elementary Level of education is to be [upon Legal perspective], the equivalent of a mental impairment when and/or especially whenever confronted with the complexities of the Judicial System - CRIMINAL DIVISION - Charged with murder in the first degree, notwithstanding the Availability in proffer of Mr. Jose Albert Castro's County/State prison psychological-Mental Health records.

12). In Pabon v. Superintendent, 2011 U.S. App Lexis (3rd Cir. 2011). There, the Petitioner filed a federal Habeas Corpus Petition After the AEPDA deadline invoking "Equitable Tolling" on grounds that he did not have Access to Legal materials translated into spanish and not given the Assistance of a translator. the Habeas Petition was denied. subsequent, the Third Circuit Court of Appeals reversed. the Appeals Court held: "that the denial of Legal Materials translated into spanish or the services of a translator constituted grounds for equitable tolling." the case was remanded to the District Court for an evidentiary hearing.

13). Like Pabon, ~~supra~~, in the case of Mr. Castro, Here it should've been obvious to the Court, Defense Counsel, and the Commonwealth that Petitioner was in dire need of Two interpreting Services At All Stages of the Criminal proceedings yet All Legal documentation As pertain to Petitioner's Mandatory interaction with the police, including Arraignment, pre-trial Matters and Petitioner's Jury trial inquestion, "Were not" provided to him transcribed-translated in spanish. thus the limited case material that Petitioner has in his possession [for the pass five years] is in english transcript, All of which remained meaningless to Petitioner, An illiterate mentally impaired man who does not speak the english language.

(B). PETITIONER'S RIGHTS TO DUE PROCESS AND A FAIR TRIAL WERE VIOLATED BY THE MISCONDUCT OF THE DISTRICT ATTORNEY AND DEFENSE COUNSEL IN FAILING TO PROTECT PETITIONER'S RIGHTS UNDER THE CONFRONTATION CLAUSE AND THE COMPULSORY PROCESS IN JOINT STIPULATION OF AND FOR THE ADMISSIBILITY OF THE CORONER'S REPORT ABSENCE UNDER OATH QUALIFICATION;

14). For the Courts information, the Commonwealth's Case Against Petitioner derived from the Coroners [Corpus Delicti] report. Here, wrongful stipulation occurred between the Commonwealth and Petitioner's Defense Attorney "that the decease, Pedro Solis-Baez, date of death was July 31, 2009, At 12:36 p.m. cause of death was multiple gunshot wounds, manner of death was homicide, and the Commonwealth does not need to call the Coroner, Barry Bloss, to testify to such."

15). The Court instructed/told the jury - "When Counsel have Agreed that certain facts are true, you are to take them as being true without the need for evidence to prove them of being present to you." see Trial Note/Testimony page 110.

16). The improper stipulation violates the Canon of Judicial ethics and stand in direct Violation of Petitioner's right to a full and meaningful opportunity to cross-examine as warranted under Confrontation Clause.

17). PCRA Counsel was ineffective for failing to Argue trial Counsel's ineffectiveness where said Stipulation impeded upon Petitioner's Sixth Amendment right to Challenge All evidence that the Commonwealth may use against him. As trial Counsel can hardly be said to have made a strategic choice against pursuing [on the record] trial Testimony from the Commonwealth's Coroner under circumstance's where as the Commonwealth has Charged and successfully prosecuted Petitioner on the Criminal Offense of Murder in the first degree. see: U.S. v. Gray, 878 F.2d 702, 711 [3d Cir. 1989].

18). Here, obvious consideration must involve the "full Damaging Potential" of the stipulation in relation to not calling and/or requiring Coroner, Barry Bloss, to take the witness stand and state with unequivocal scientific, medical and moral certainty that the decease was infact the victim of a homicide. essentially to give court testimony independent of what the other prosecution witnesses claim to have heard or saw.

19). With the courts indulgence; please permit Petitioner to proffer what is believe to be a conceivable theory. "Had the Coroner been subpoena to testify then Defense Counsel could have asked him whether or not [during the Coroner examination] consideration was given to rule out any possibility that the person could've -already- been deceased (by means unknown), before someone apparently decided to fire multiple Gun-Shots into the body? Which would indicate only "Abuse of A Corpse," not Murder, nor Attempted Murder.

20). However, in real jury trial representation Defense Counsel's stipulation of the presumed creditable evidence, i.e. "the Coroner Report," worked to Petitioner's detriment because the Coroner Report was indeed relied upon in the prosecutions case.

21). Wherefore simple wisdom dictate that when a Defense Attorney stipulates to the Commonwealth using prosecutorial [Evidence], information against a defendant or a certain procedure to present evidence against the defendant -"Case in Chief"- an on-the record colloquy is required see: Com. v. Williams, 297 Pa. Super. 138, 146, 443 A.2d 338, 342 (1982); Also for controlling case law see: Julian v. United States, 236 F.2d 155.

(C). POST CONVICTION COUNSEL WAS UNCONSTITUTIONALLY INEFFECTIVE IN FAILING TO ARGUE TRIAL COUNSEL'S DEFICIENT REPRESENTATION - COUNSEL NEGLECTED TO MOTION TO ARREST THE CRIMINAL BILL OF INFORMATION/INDICTMENT AGAINST PETITIONER

21). In brief digest, is the filing of A NO-Merit Letter legally justified on the part of Petitioner's PCRA Counsel? the Answer is no.

22). Petitioner Contend that PCRA-Counsel, John M. Hammes, should have motion/Petition the Court for evidentiary development to produce And show exculpatory evidence in the viewing of A videotape that was obtained by the commonwealth Approximately 4-months prior to Petitioner's Jury trial from the Community Progress Council - And - subsequent obtained by Defense Counsel, Gerald A. Lord, VIA discovery request, Astonishing the video Clearly show/expose A lone individual [Adult Male], who is NOT THE PETITIONER At A time immediately following the shooting in question. the man exited the purported crime scene And with deliberate Calm as not to draw Any Attention to himself, simply walked Away.

22). PCRA-Counsel failed to review the entire Case record because there exist no other Logical explanation for Counsel not to Argue that prior to the Start of Petitioner's Jury trial, Defense Counsel had An obligatory duty toward his Client to first Petition the Court seeking to Arrest the Criminal Bill of Information Against Petitioner due to evidence establishing Actual innocence - And - in the event trial-Court denied Relief, Defense Counsel next "could have," move to suspend All further pre-trial proceedings by filing An Application for Extraodinary Relief, before the Supreme Court of Pennsylvania, pursuant to Pa. R.A.P. 3309 And 42 Pa.

C.S. Section 726., for the requested relief. however trial counsel chose not to protect [Mr. Castro] Petitioner's state and federal constitutional right to liberty in avoidance of further false imprisonment.

23). For the Courts information, Argument partaing to the Afore mentioned Video tape was the sole issue upon state collateral Appeal, Litigated in pro se capacity on behalf of Mr. Castro, "Petitioner," by someone other then the undersigned. please find Attached hereto the February 9, 2015, Superior Court-Memorandum/Decision.

24). PCRA-Counsel's non-action And/or deliberate indifference to Petitioner's right to A claim of Actual Innocence is by All legal Standards "Shocking to the Universal sense of Justice". Redress is warranted. Strickland v. Washington, 466 U.S. 668 (1984).

(D). THE COMMONWEALTH ENGAGED IN A BAD FAITH PROSECUTION TO SECURE A MURDER CONVICTION IN DISREGARD OF OBTAINED VIDEO TAPE EVIDENCE SUBSTANTIATING ACTUAL INNOCENCE IN FAVOR OF THE ACCUSED.

25). Petitioner is Actually-factually innocent of Murder. Here, the trial court instructed And/or informed the Jury that [Petitioner], Mr. Jose Albert Castro, is presumed innocent And that guilt must be must be proven by the Commonwealth beyond A reasonable doubt.

26). The Criminal history of this Case reveal that initially the person sought for the Murder of one, Pedro Solis-Baez, was conducted via Extradition form processing, said document was Officially filled-out And Submitted to the proper Law Enforcement Agency by Prosecution Police Agent, Detective, Baez, Calling for the Arrest/Apprehension of A person named Jose Castro, purportedly depict with tattoos on his Arms/shoulders, this information was corroborated by the York County police investigation report of one, Jose Cartagena, who in turn became a cross-over witness for the defense.-And-further confirm [tattoo information], by Commonwealth witness, Ismael Sanchez, "A.K.A. Coco. However the injurious error committed by the unlawful arrest, subsequent conviction-resulting in a life sentence of Petitioner is that, "Your Petitioner, has a different date of birth, different physical characteristics, a different social security number, and most important, Petitioner does not possess/have tattoos anywhere on his body.

27). Petitioner has been treated unjustly in manner of police negligence allowing a wrongful issuance of process in mistaken identity to remain unchecked.

28). Petitioner contend; that the error alluded to was never a matter for the jury to deliberate, "fact is, it was and continue's to be a matter for the court to correct.

Wherefore, Petitioner hereby argue in proper application pleading exception circumstances for right to proceed-out of time- asserting actual innocence of the criminal offenses as charged in which his state/federal constitutional safeguards were infringed upon by the York County District Attorney's Office and it's prosecutorial police agents. thus Petitioner [in legal ma...] request De Novo reviews before this U.S. District Court, based upon profound decision wisdom by the Third Circuit Court of Appeals, At; Parham vs. Klem, 2012 U.S. App. Lexis 19312 (3rd Cir. 2012), Announcing; "That a state prisoner can use a rule 60 motion or independent action to bring a U.S. District Court new facts supporting a claim of actual-factual innocence [even at this late hour], as explained in Parham.,

VALID REASON'S

Reason-I; Here, Petitioner's, Post Conviction counsel failed to raise the afore stated claims of constitutional error before the York County Court of Common Pleas or at the

State-Appellate Level [Pa. Superior Court], hence Petitioner is now foreclosed from Attempting to exhaust his claims in state Court because such Action is time barred under the Post Conviction Relief Act, 42 Pa. C.S.A. 9545 (b)(1). See: Whitney v. Horn, 280 F.3d 220, 250 (3rd. Cir. 2002), "futility exist where the state provide no means of seeking relief sought."

Furthermore, Mr. Castro, (Petitioner), states that he has asserted an actual innocence claim as a gateway to any default claims-raise as previously invoked on cover page and throughout the body of discussion. in perspective "this" writ of Habeas Corpus. Exercise by a state prisoner pursuant to 28 U.S.C. section 2254 can and must be construed as an independent action, thus per operation jurisdictionally, empowers this Court to allow for review.

Reason-II; The United States Supreme Court Afforded state convicted prisoners a new constitutional safety net to rely upon via Martinez v. Ryan, 2012 U.S. Lexis 2317, 566 U.S. 1 and it's prodigy decision Trevino v. Thaler, No. 11-10189 (May 28, 2013).

In Martinez, The U.S. Supreme Court held for the "first time" That an individual has the equitable right to effective assistance of counsel in Post Conviction proceeding where, as in Pennsylvania and similar situated states, the Petitioner is required to raise counsel's ineffectiveness via Post Conviction. In short discussion, A valid claim of trial counsel's unreasonable breach of his/her professional responsibilities constituting Attorney Abandonment "or" ineffective assistance, and PCRA-Counsel fail to take issue then the claim is not procedurally barred and can be litigated in a Federal Habeas Corpus petition as long as a convicted state criminal defendant can show that his conviction rest upon a violation of the Federal Constitution, he may well obtain a writ of Habeas Corpus that requires a new trial, new sentence, or release.

Respectfully, the Case At bar requires federal Jurisdictional review thereby bringing this claim within the ambit of Martinez, And to further serve As A gateway to Any procedural default. Hence, A review on/of the merits Concerning A Constitutional claim is Justified.

REQUEST FOR RELIEF

Based upon the foregoing, Jose Albert Castro, Petitioner Request that the Court grant him the following relief;

(1). That Counsel be Appointed -and- Assign an enterpreter to represent Petitioner in this Habeas Corpus proceeding.

(2). That An Evidentiary Hearing be Conducted on Any disputed issue's of Material facts.

(3). That Leave to Amend this writ of Habeas Corpus Petition, if necessary, be granted.

(4). That Respondent be ordered to Answer this Petition.

(5). That Petitioner be permitted to file An Appropriate response to Any defense raised by Respondants.

(6). That Petitioner's Conviction ("first degree Murder"), And Sentence [Life], be vacated.

(7). Any other relief that the Court deems Petitioner May be entitled in this proceeding.

CONCLUSION

Mr. Jose Albert Castro, Petitioner, believes that he has been diligent to the best of his Ability in his Attempt At trying to meet the procedural requirement of the Court. That due to exceptional Circumstances ["Actual Innocence"], As well Petitioner's non-Comprehension of the English Language And on file, Mental impairment. Any procedural default cannot be Attributable to your Petitioner.

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA Appellee v. JOSE ALBERT CASTRO Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1682 MDA 2013

Appeal from the PCRA Order August 28, 2013
In the Court of Common Pleas of York County
Criminal Division at No(s): CP-67-CR-0000463-2010

BEFORE: BENDER, P.J.E., OLSON and OTT, JJ.

MEMORANDUM BY OLSON, J.: **FILED FEBRUARY 09, 2015**

Appellant, Jose Albert Castro, appeals *pro se* from the order entered on August 28, 2013 dismissing his petition for relief filed pursuant to the Post-Conviction Relief Act ("PCRA"), 42 Pa.C.S.A. §§ 9541-9546. We affirm.

This Court has previously outlined the factual background of this case as follows:

> Appellant was involved in the business of selling drugs. The decedent bought drugs from Appellant and owed him money. Three days before the [decedent's] shooting, Appellant told a witness named Ismael Sanchez, a.k.a. Coco, that Appellant was going to kill the decedent if he did not pay Appellant.
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> On the day of the incident, Coco watched Appellant shoot the decedent. Also Braulio Ortiz saw Appellant walk towards the decedent and shoot him multiple times. Medical evidence later showed the decedent died from the shooting.

Commonwealth v. Castro, 43 A.3d 528 (Pa. Super. 2012) (unpublished memorandum), at 1-2, *appeal denied*, 49 A.3d 441 (Pa. 2012), *cert denied*, 133 S. Ct. 871 (2013).

The procedural history of this case is as follows. On February 18, 2010, Appellant was charged via criminal information with first-degree murder[1] and third-degree murder.[2] On September 16, 2010, Appellant was found guilty of first-degree murder. On November 30, 2010, Appellant was sentenced to life imprisonment without the possibility of parole. On December 9, 2010, Appellant filed a post-sentence motion which was denied on May 6, 2011. This Court affirmed his judgment of sentence, our Supreme Court denied allocatur, and the Supreme Court of the United States denied certiorari.

On January 28, 2013, Appellant filed a *pro se* PCRA petition. Counsel was appointed. On May 6, 2013, counsel filed a no merit letter and motion to withdraw as counsel pursuant to ***Commonwealth v. Turner***, 544 A.2d 927 (Pa. 1988), and ***Commonwealth v. Finley***, 550 A.2d 213 (Pa. Super. 1988) (*en banc*). On May 29, 2013, the PCRA court issued notice, pursuant to Pennsylvania Rule of Criminal Procedure 907(1), of its intent to dismiss the petition without an evidentiary hearing. On that same day, the PCRA court granted counsel's motion to withdraw. Appellant responded to the

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[1] 18 Pa.C.S.A. § 2502(a).

[2] 18 Pa.C.S.A. § 2502(c).

PCRA court's Rule 907 notice on June 13, 2013, raising PCRA counsel's ineffectiveness in multiple areas. On August 28, 2013, the PCRA court dismissed Appellant's petition. Appellant filed a timely notice of appeal.[3] On August 13, 2014, this Court dismissed the appeal because Appellant failed to file a brief. On August 28, 2014, this Court reinstated the appeal.

Appellant presents one issue for our review:

> Did the PCRA court err in dismissing the petition without a hearing, and was PCRA counsel ineffective, where Appellant raised a meritorious issue of trial counsel's ineffectiveness for failing to present exculpatory evidence to the jury?

Appellant's Brief at 4 (complete capitalization removed).

"Our standard of review of an order denying PCRA relief is whether the record supports the PCRA court's findings of fact, and whether the PCRA court's determination is free of legal error." ***Commonwealth v. Wantz***, 84 A.3d 324, 331 (Pa. Super. 2014) (citation omitted). "The scope of review is limited to the findings of the PCRA court and the evidence of record, viewed in the light most favorable to the prevailing party at the trial level." ***Commonwealth v. Spotz***, 84 A.3d 294, 311 (Pa. 2014) (citation omitted).

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[3] On September 24, 2013, the PCRA court ordered Appellant to file a concise statement of errors complained of on appeal ("concise statement"). ***See*** Pa.R.A.P. 1925(b). On October 17, 2013, Appellant filed his concise statement. On November 22, 2013, the PCRA court issued its Rule 1925(a) opinion. In its brief, the Commonwealth contends that Appellant's lone issue on appeal was not included in his concise statement. Although the wording of the question presented by Appellant differs from the wording used in his concise statement, a fair reading of the concise statement includes Appellant's lone issue raised on appeal. Therefore, Appellant's lone issue is not waived for appellate review. ***Cf. Pa. Nat'l Mut. Cas. Ins. Co. v. St. John***, 2014 WL 7088712, *24 n.7 (Pa. Dec. 15, 2014).

Appellant's lone claim on appeal is that his trial counsel rendered ineffective assistance.[4] Our Supreme Court has explained:

> [T]o prove counsel ineffective, [a PCRA] petitioner must demonstrate: (1) the underlying claim has arguable merit; (2) no reasonable basis existed for counsel's actions or failure to act; and (3) the petitioner suffered prejudice as a result of counsel's error such that there is a reasonable probability that the result of the proceeding would have been different absent such error. Counsel is presumed to have rendered effective assistance.
>
> A court is not required to analyze the elements of an ineffectiveness claim in any particular order of priority; instead, if a claim fails under any necessary element of the ineffectiveness test, the court may proceed to that element first. Finally, counsel cannot be deemed ineffective for failing to raise a meritless claim.

Commonwealth v. Tharp, 101 A.3d 736, 747 (Pa. 2014) (citations omitted).

Appellant argues that his trial counsel was ineffective for failing to show the jury videos taken by cameras owned by the Community Progress Council. He argues those videos show a different individual at the crime scene immediately after the murder occurred. This claim is without arguable merit. The certified record reflects that two videos taken from the Community Progress Council were played for the jury and that the third camera was broken and did not produce any relevant recording. N.T.,

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[4] Appellant also claims his PCRA counsel rendered ineffective assistance by failing to pursue the claim of his trial counsel's ineffectiveness. As we conclude that trial counsel rendered effective assistance, PCRA counsel was not ineffective for failing to pursue this claim. ***See Commonwealth v. Perez***, 103 A.3d 344, 350 (Pa. Super. 2014).

9/14/10, at 300-303;[5] N.T., 9/15/10, at 348-351, 354-355; Defendant's Exhibits 1 and 2. As the jury saw the videos, Appellant's claim that his trial counsel was ineffective for failing to present the videos to the jury is without arguable merit. Furthermore, as the jury saw the videos, Appellant is unable to prove the requisite prejudice to prevail on an ineffective assistance of counsel claim.

Order affirmed.

Judgment Entered.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 2/9/2015

[5] The notes of testimony from the trial are contained in one volume. We cite to the correct date and the page number as reflected in the single volume.